STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MEGHAN BARONI, individually and as Personal Representative of the Estate of Matthew-Micheal Theron Baroni, Deceased, *Plaintiff*, vs. **RYAN J. TURNER, and COBRA BEC, INC., a corporation,** *Defendants*.	Case No. **CV 2016 4299** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY**

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This is a wrongful death lawsuit. This matter is before the Court on plaintiff Meghan Baroni's (Baroni) Motion for Summary Judgment. On June 9, 2016, Baroni filed a Complaint against defendants Ryan J. Turner (Turner) and Cobra BEC, Inc. (Cobra BEC). In her Complaint, Baroni alleges that Turner is liable for the wrongful deaths of her husband, Mathew-Micheal Theron Baroni, and her two daughters, Madilyn Jeanne Baroni and Molli Catherine Baroni. Compl. 3, ¶ 12. She also alleges that Turner's liability is imputed to Cobra BEC pursuant to Idaho Code § 49-2417. Compl. 4, ¶ 4. Baroni seeks summary judgment as to the liability of both Turner and Cobra BEC. Pl.'s Mem. Supp. Pl.'s Mot. Summ. J. 22–23.

Turner is a former employee of Cobra BEC. Zeimantz Dec. Ex. H, Nuss Dep. 16:14–21. Turner's employment with Cobra BEC began in July or August 2011 and ended on September 15, 2015. *Id.* Turner was terminated three days after the

September 12, 2015, car wreck and deaths he caused. On or about February 23, 2015, Cobra BEC issued Turner a 2011 Chevrolet Silverado (Silverado). *Id.* at Ex. H, Nuss Dep. 17:9–11. Cobra BEC owned the Silverado. Nuss Dec. 4, ¶ 10; Zeimantz Dec. Ex. B, C. Cobra BEC permitted Turner to use the Silverado for business and non-business purposes and park the Silverado at his residence when not in use. Nuss. Dec. 3–4, ¶¶ 8–10. Turner's use of the Silverado was governed by Cobra BEC's Substance Abuse and Vehicle Safety Programs. Nuss Dec. Ex. C; Zeimantz Dec. Ex. A, at 10000698. The Vehicle Safety Program includes Cobra BEC's Personal Use of Company Vehicle Policy, which permits employees to use Cobra BEC vehicles for non-business purposes. Nuss Dec. Ex. C; Zeimantz Dec. Ex. A, at 10000698. That same policy and Cobra BEC's Substance Abuse and Vehicle Safety Programs prohibit Cobra BEC employees from consuming alcohol or drugs prior to or while operating Cobra BEC vehicles. Nuss Dec. Ex. C; Zeimantz Dec. Ex. A, at 10000698.

On September 11, 2015, Turner attended a private party hosted by a friend, Michael Johnson. Cobra BEC's Dep. Excerpts, Turner Dep. 76:24–77:3. He recalls consuming three beers at the party. Cobra BEC's Dep. Excerpts, Turner Dep. 83:11–19. Turner states that he has no memory of the evening after consuming the third beer, which he estimates occurred sometime between 8:00 p.m. and 9:00 p.m. *Id.* According to a witness, Turner left the party sometime after 12:00 a.m. on September 12, 2015. Wagenius Dec. 2–3, ¶ 8. The Silverado's GPS data shows Turner leaving Michael Johnson's residence at 12:40 a.m. Second Nuss Dec. 3, ¶ 5, Ex. D. Between 12:40 a.m. and 3:42 a.m., Turner drove the Silverado on highways and roads in Athol, Rathdrum, and the surrounding area. *Id.* at 3, ¶ 6, Ex. D. At some point, Turner entered Highway 95 where, at approximately 3:42 a.m., he collided with a vehicle driven by Baroni's husband, Mathew-Micheal Theron Baroni. Cobra BEC's Dep.

Excerpts, Turner Dep. 9:13–23; Baroni Dec. 1–2, ¶ 2. Turner was intoxicated and driving the wrong way on Highway 95 when the collision occurred. Baroni Dec. 1–2, ¶ 2. The collision killed Mathew-Micheal Theron Baroni and Baroni's two daughters, Madilyn Jeanne Baroni and Molli Catherine Baroni. *Id.*

On September 15, 2015, Cobra BEC terminated Turner's employment. Zeimantz Dec. Ex. D. On September 21, 2015, Turner was charged with three counts of felony vehicular manslaughter (*State of Idaho v. Ryan J. Turner*, Kootenai County Case No. CR-2015-15617). While criminal charges were pending against Turner, Baroni filed the instant civil action against Turner and Cobra BEC. On June 30, 2016, Cobra BEC filed its Answer to Baroni's Complaint. On July 14, 2016, Turner filed a Motion to Stay Civil Action Pending Resolution of Criminal Proceedings. On August 23, 2016, this Court ordered the civil proceedings against Turner stayed until entry of a plea agreement, plea, or verdict in the criminal proceedings. On October 20, 2016, Turner entered a plea of guilty to the pending criminal charges, and as a result, Baroni's civil action against Turner resumed. On November 9, 2016, Turner filed his Answer. On February 1, 2017, Cobra BEC filed an Amended Answer and Cross-Claim, and on February 13, 2017, Turner filed an Answer to Cobra BEC's cross-claim.

On June 22, 2017, Baroni filed a Motion for Summary Judgment "as to the liability of Defendants on the claims presented by Plaintiff in her complaint filed in this cause." Pl.'s Mot. Summ. J. 1. That same day, Baroni filed Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment, Plaintiff's Statement of Undisputed Facts, Declaration of Meghan Baroni, and Declaration of John R. Zeimantz.

On July 17, 2017, Cobra BEC filed its Brief in Opposition to Plaintiff's Motion for Summary Judgment. It simultaneously filed Defendant Cobra's Statement of Disputed Facts, Second Declaration of Ron T. Blewett, Defendant Cobra BEC, Inc.'s Deposition

Excerpts in Opposition to Motion for Summary Judgment, Declaration of Dan Waite, and Declaration of Travis Dix. Cobra BEC also resubmitted the Declaration of Aaron Nuss and Declaration of Ron T. Blewett, which were originally submitted in support of Cobra BEC's now withdrawn Motion for Summary Judgment. In addition to its brief and supporting evidence, Cobra BEC filed a Rule 56(c)(2) Notice of Objections, in which it objects to evidence offered by Baroni.

On July 19, 2017, Turner filed Defendant Ryan J. Turner's Response to Plaintiff's Motion for Summary Judgment.

On July 26, 2017, Baroni filed Plaintiff's Reply to Responses of Defendants Ryan Turner and Cobra BEC, Inc. to Plaintiff's Motion for Summary Judgment, Plaintiff's Response to Cobra's Rule 56(c)(2) Notice of Objections, and Plaintiff Meghan Baroni's Rule 56(c)(2) Notice of Objections.

On July 31, 2017, Cobra BEC filed Defendant Cobra BEC, Inc.'s Response to Meghan Baroni's Rule 56(c)(2) Notice of Objections.

On August 2, 2017, a hearing on Baroni's Motion for Summary Judgment was held. At the conclusion of that hearing, Baroni's Motion was taken under advisement.

II. STANDARD OF REVIEW.

A. Objection to Evidence.

Before addressing the merits of a motion for summary judgment, the trial court must determine the admissibility of evidence as a threshold question. *Hecla Mining Co. v. Star–Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992). In *Gem State Insurance Company v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007), the Idaho Supreme Court explained that,

> [w]hen considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. Thus, if the admissibility of evidence

> presented in support of a motion for summary judgment is raised by objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence "before proceeding to the ultimate issue, whether summary judgment is appropriate."

Id. at 14, 175 P.3d at 176 (citations omitted). The trial court's evidentiary rulings are reviewed for an abuse of discretion. *Shane v. Blair*, 139 Idaho 126, 128, 75 P.3d 180, 182 (2003). "To determine whether a trial court has abused its discretion, [the appellate court] consider[s] whether [the trial court] correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." *Id.* at 128–29, 75 P.3d at 182–83.

B. Motion for Summary Judgment.

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth,*

Nungester & Lezamiz, Inc., 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions.

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003) (citations omitted).

III. ANALYSIS.

A. Cobra BEC's Objection to Baroni's Evidence.

1. Objection to Exhibits B, C, E, and F of the Declaration of John R. Zeimantz

Cobra BEC argues that Exhibits B, C, E, and F of the Declaration of John R. Zeimantz are inadmissible because the exhibits are not relevant to the issue of Cobra BEC's liability under Idaho Code § 49-2417 and, therefore, are inadmissible pursuant to Idaho Rule of Evidence 402.[1] Def. Cobra BEC, Inc.'s Rule 56(c)(2) Notice Objs. 3–5.

Cobra BEC states that Exhibit B, a copy of its Commercial Insurance Policy issued by Alaska National Insurance Company (Alaska National Policy), is not relevant for two reasons. First, because damages are not at issue in Baroni's Motion for

[1] Idaho Rule of Evidence 402, in part, provides that "[e]vidence which is not relevant is

Summary Judgment, the Alaska National Policy limits are not relevant, admissible, or appropriate at this time. *Id.* at 3. Second, "the question of whether or not [Turner] had [Cobra BEC's] express or implied permission to operate the [Silverado] at the time of the crash is based upon the [sic] how the term permission is used in conjunction with Idaho Code § 49-2417 and not how that term is defined in any insurance policy." *Id.* at 4. In response, Baroni argues that, "one element . . . under the imputed negligence statute of I.C. § 49-2417 is the fact the owner had automobile insurance coverage in place and the amount thereof." Pl.'s Resp. Cobra BEC's Rule 56(c)(2) Notice Objs. 2. Accordingly, Baroni argues that the Alaska National Policy is proof of that element. *Id.* Baroni is correct that I.C. § 49-2417 mentions "insurance coverage", but only in the context of the "limits" of the liability of owner of a motor vehicle. Idaho Code § 49-2417(2) limits liability of the owner of a motor vehicle to the greater of 1) "the amounts set forth under 'proof of financial responsibility' in section 49-117, Idaho Code" or "the limits of the liability insurance maintained by the owner." The problem with Baroni's argument is whether the statutory minimum or a greater limit due to insurance is not at issue at summary judgment. Idaho Code § 49-2417(2) is only relevant as to damages, and damages are not the subject of Baroni's summary judgment motion. Liability under I.C. § 49-2417 is the subject of Baroni's summary judgment motion. The Court agrees with Cobra BEC and finds that the Alaska National Policy is not relevant to the issues presented in Baroni's Motion for Summary Judgment. With respect to imputing liability to Cobra BEC, Cobra BEC's liability to Baroni is based on whether a) Cobra BEC owned the Silverado, and b) whether Turner had permission from Cobra BEC to operate its Silverado. The fact that Cobra BEC insured the Silverado is not a relevant to ownership of the Silverado or Turner's permission to use the Silverado.

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not admissible." I.R.E. 402.

With regard to Exhibit C, a copy of Cobra BEC's Commercial Navigators Excess Policy (Umbrella Policy), Cobra BEC contends that its Umbrella Policy is not relevant to the question of whether Turner was a permissive driver for purposes of Idaho Code § 49-2417. *Id.* Baroni argues that the Umbrella Policy is relevant for the same reasons that the Alaska National Policy is relevant. For the same reasons set forth above pertaining to the Alaska National Policy, the Court agrees with Cobra BEC—the Umbrella Policy is not relevant to whether or not Cobra BEC is liable for Turner's negligence under Idaho Code § 49-2417.

As for Exhibits E and F, a copy of the Complaint for Declaratory Judgment and the Declaratory Judgment in CV-2016-1303 (*State Farm Mutual Insurance Co. v. Ryan J. Turner*), Cobra BEC argues that both exhibits are "utterly void of any relevance on the issue of [Cobra BEC's] liability under [Idaho Code § 49-2417] and are entirely inappropriate." *Id.* at 4–5. In response, Baroni argues that both exhibits are relevant because the "fact there is no personal insurance coverage for the at fault driver, validates and demonstrates the public policy behind I.C. § 49-2417 and the initial permission rule." Pl.'s Resp. Cobra's Rule 56(c)(2) Notice Objs. 3. The Court agrees with Baroni—the Complaint for Declaratory Judgment and the Declaratory Judgment are relevant because they underscore the public policy basis for Idaho Code § 49-2417.

2. Objection to Portions of Turner's Deposition Testimony.

First, Cobra BEC argues that the following excerpt from Turner's deposition testimony is inadmissible hearsay:

> Q. Cobra gave you permission to use one of its pickup trucks to go to and from work, didn't it?
> A. Yes.
> . . .
> Q. Okay. And you were given permission to use this pickup truck and the prior one for your personal use, as well, correct?
> A. On occasion.

Def. Cobra BEC, Inc.'s Rule 56(c)(2) Notice of Objs. 5 (quoting Zeimantz Dec. Ex. G, Turner Dep. 58:11–13, 58:19–22). Cobra BEC explains that "[p]ermission for use of the vehicle at issue can only emanate from Cobra and, thus, constitutes an assertion by Cobra." *Id.* Accordingly, Cobra BEC argues that Turner's answer is based on an out-of-court assertion made by Cobra BEC. *Id.* at 5–6. Assuming Cobra BEC made an out-of-court statement (by implication), Baroni is offering that statement against Cobra BEC and the statement is Cobra BEC's own statement. Thus, Cobra BEC's implied statement is a party opponent statement, and pursuant to Idaho Rule of Evidence 801(d)(2), it is not hearsay. As a result, the excerpt above is not based on hearsay and is admissible.

Second, Cobra BEC argues that the following excerpt is inadmissible because, without more foundation, Turner's statement is conclusory and speculative:

> Q. Okay. Cobra management was aware of your personal use of the pickup?
> A. To a point, yes.

Id. at 6 (quoting Zeimantz Dec. Ex. G, Turner Dep. 59:5–9). The Court finds that the excerpt is inadmissible because it lacks foundation as there is no basis given by Turner for his statement that Cobra BEC was aware of his personal use.

Third, Cobra BEC argues that Turner's deposition testimony related to Turner's personal vehicle insurance is not relevant and is inadmissible. *Id.* (citing Zeimantz Dec. Ex. G, Turner Dep. 65:23–69:10). Baroni does not appear to cite to or rely on that portion of Turner's deposition testimony. Nevertheless, it is admissible for the same reason that Exhibits E and F of the Declaration of John R. Zeimantz are admissible—Turner's lack of insurance is relevant to the public policy justifications of I.C. § 49-2417.

Fourth, Cobra BEC argues that excerpts of Turner's deposition testimony related to his intent to drive the Silverado on the date of the collision are inadmissible because

Turner is not competent to testify on that topic. *Id.* at 7–8. Cobra BEC contends that Turner is not competent because he cannot recall anything about his intent or about driving Cobra BEC's Silverado on the day of the crash. *Id.* Baroni argues that Turner is competent to testify about his intent with respect to driving the Silverado. Pl.'s Resp. Cobra's Rule 56(c)(2) Notice Objs. 4. Baroni states that Turner recalls his intention to drive the Silverado from his house to Michael Johnson's for a party, and that the "nature of that conduct does not evince an intent to convert or steal. [Turner's] use continued with no evidence of any change in intent up through the moment of the collision." *Id.* The Court agrees with Baroni that Turner is competent to testify about his intent to drive BEC's vehicle to the extent he recalls on September 11, 2015, the evening before the early morning crash on September 12, 2015.

B. Baroni's Objections to Cobra BEC's Evidence.

As a preliminary matter, while not objected to by Baroni, Cobra BEC, Inc.'s Deposition Excerpts in Opposition to Motion for Summary Judgment do not comply with Rule 56. The excerpts of deposition testimony from Turner, Nuss, and Johnson all include the portion demonstrating that they are under oath but not the signed reporter's certificate page. In addition, the excerpts were not submitted as an exhibit to an affidavit and so there is no statement verifying their authenticity. The Idaho Supreme Court addressed this issue in *Path to Health, LLP v. Long,* 161 Idaho 50, __, 383 P.3d 1220, 1224–26 (2016), though note that the Idaho Supreme Court is citing to the old Rule 56. Cobra BEC acknowledges that the excerpts might not be up to par. In its "cautionary note", Cobra BEC states:

> Counsel have informally agreed that copies of deposition submissions for summary judgment purposes need not be signed by the Court Reporter. In some cases, the signed versions are unavailable without breaking the seal of the original transcript; in others, the transcripts are only freshly received. In the event the Court requires signed versions of the

depositions transcripts, leave of Court is respectfully sought under Rule 56(f) to supplement these submissions.

Def. Cobra BEC, Inc.'s Dep. Excerpts in Opp'n to Mot. for Summ. J. 2. The parties having apparently agreed, the Court does not require this compliance with I.R.C.P. 56.

1. Declaration of Aaron Nuss.

Baroni objects to paragraphs 5, 6, 7, 14, 15, and 16 of the Declaration of Aaron Nuss and Exhibits A and B and a portion of Exhibit C attached to the Declaration of Aaron Nuss. Pl. Meghan Baroni's Rule 56(c)(2) Not. of Obj. 2.

The Court denies or overrules the objections to paragraph 5, 6, and 7 and Exhibits A, B, and C. These paragraphs and exhibits are relevant because they describe the context in which Cobra BEC granted Turner permission to use the Silverado. While scope of permission is generally not a factor when determining whether a driver has permission to use the owner's vehicle pursuant to Idaho Code § 49-2417 and the initial permission rule, the scope of permission is relevant to the extent that the driver is an alleged thief or converter. Because the parties dispute whether Turner is akin to a thief or converter, Cobra BEC should be allowed to explain its restrictions on employee use of its vehicles. The Court strikes paragraphs 14, 15, and 16 of the Declaration of Aaron Nuss as they are conclusory statements of law and fact.

2. Second Declaration of Aaron Nuss.

Baroni objects to portions of paragraphs 9 and 13 of the Second Declaration of Aaron Nuss. Pl. Meghan Baroni's Rule 56(c)(2) Not. of Obj. 3. The Court makes the following evidentiary rulings:

- strikes paragraph 9, page 4, lines 6 through 8 of the Second Declaration of Aaron Nuss as a conclusory statement of fact or law. Cobra BEC argues the statement "In fact Cobra BEC explicitly prohibited Mr. Turner from using the company-owned vehicle since he had consumed alcohol." Def. Cobra BEC, Inc.'s Resp. to Pls.' Not. Obj. 3. Nuss may certainly

describe what is in the company policy, but it is impermissible for him to make legal conclusions about the effect of that policy. That is the very issue on this summary judgment motion;

- denies/overrules the objection to paragraph 13, page 5, lines 9 through 11, beginning with "it was reported to us" because it is not being used to prove the truth of the matter asserted;
- strikes paragraph 13, page 5, lines 13 through 14, as conclusory statements. Cobra BEC argues the statements, "As suggested by the felonies, it did not appear to us that the Baroni collision was just an 'accident'. People don't go to prison for accidents.", are not conclusory because they describe Nuss' (and thus Cobra BEC's) "rationale and motivation behind Cobra's determination to terminate Mr. Turner." Def. Cobra BEC, Inc.'s Resp. to Pls.' Not. Obj. 4. That does not cure the fact that Nuss is making a legal conclusion in each of those statements; and
- denies/overrules the objection of conclusory and hearsay as to paragraph 13, page 5, lines 14 through 19, which read, "Cobra management, myself included, concluded that Mr. Turner intended to drink, intended to get drunk, intended to ignore requests that he not drive, intended the consequences of drunk driving, intended to take our vehicle in violation of our rules, our permissive use limitations, and in violation of our right to control our vehicle. All these factors and others worked together to motivate our decision to terminate Mr. Turner' employment." While those statements contain legal conclusions, those statements are made in the context of Cobra BEC's decision to terminate Turner, and for that purpose, they are admitted.

3. Declaration of Travis Dix.

Baroni objects to paragraphs 2, 3, 4, 5, and 6 of the Declaration of Travis Dix as irrelevant and containing inadmissible character evidence under Idaho Rule of Evidence 404. In addition, she objects to paragraph 6 as containing conclusory statements of fact and law. Pl. Meghan Baroni's Rule 56(c)(2) Not. of Obj. 4. Cobra BEC claims the evidence is not character evidence because it is not being offered to show Cobra BEC is acting in conformity with that character. Def. Cobra BEC, Inc.'s Resp. to Pls.' Not. Obj. 5-6. As to paragraphs 2, 3, 4 and 5, the Court agrees with Cobra BEC. The Court finds Dix's statements as to Cobra BEC's policy, what Cobra BEC does relative to that

policy, the awards it has won, etc., are permissible and not character evidence. Baroni's objections as to paragraphs 2, 3, 4 and 5, are denied or overruled.

However, as to paragraph 6 of the Declaration of Travis Dix, that paragraph is stricken except the first sentence, as it is rife with legal conclusions, especially as to "permission", which, as noted above, is the issue on this summary judgment motion.

4. Declaration of Dan Waite.

In the Declaration of Dan Waite, Baroni objects to paragraph 2 as irrelevant, paragraphs 3, 4, and 5 as irrelevant and inadmissible character evidence, and paragraph 6 as a conclusory statement of fact or law. Pl. Meghan Baroni's Rule 56(c)(2) Not. of Obj. 4. Cobra BEC argues paragraph 2 is foundational and paragraphs 2, 4 and 5 describe the safety programs at BEC. Def. Cobra BEC, Inc.'s Resp. to Pls.' Not. Obj. 7. The Court finds paragraph 2 is foundational, and thus, Baroni's objection is denied or overruled. The Court finds paragraphs 3, 4 and 5 are relevant, are not inadmissible character evidence, and thus, Baroni's objection is denied or overruled. However, as to paragraph 6 of the Declaration of Waite, that paragraph is stricken in its entirety as it speaks only to the legal conclusion of "permission", the very issue on this summary judgment motion.

5. Declaration of Larry Wagenius, Jr.

Baroni objects to the first sentence of paragraph 7 as irrelevant and impermissible character evidence. Pl. Meghan Baroni's Rule 56(c)(2) Not. of Obj. 4. The statement, "Cobra BEC is a very safety-oriented company as it continually stresses the importance of safety to its employees" is not irrelevant and is not impermissible character evidence, but it is conclusory and lacks foundation in the rest of his declaration. Thus, the first sentence is stricken. The second sentence, "As part of its Vehicle Safety Rules, No employee is supposed to consume alcohol or drugs prior to or

during the use of vehicles or even have any alcohol around Cobra BEC vehicles" is not irrelevant and is not impermissible character evidence. Thus, Baroni's objection as to the second sentence is denied or overruled. Baroni objects to the following portions of paragraph 9 of the Declaration of Larry Wagenius, Jr.

> My personal habit is not to drive if I have consumed any alcohol whatsoever. I didn't think he should either. Cobra's safety ethic encourages any employee to speak up with safety concerns. Ryan would be in violation of Cobra rules if he drove a Cobra vehicle after drinking alcohol.

Pl. Meghan Baroni's Rule 56(c)(2) Not. of Obj. 4-5. The Court agrees that the first sentence is simply not relevant, and thus, that sentence is stricken. The Court finds Cobra BEC's argument that the first sentence "expresses one of the reasons why he told Mr. Turner not to drive" (Def. Cobra BEC, Inc.'s Resp. to Pls.' Not. Obj. 8), unavailing. Wagenius' Declaration does not make such a connection. The Court finds the second sentence is not relevant, and thus, is stricken. The Court finds there is no foundation within Wagenieus' Declaration for the third sentence, and thus, that sentence is stricken. The last sentence has foundation within Wagenius' Declaration, as noted above in paragraph 7 where Wagenius states: "As part of its Vehicle Safety Rules, No employee is supposed to consume alcohol or drugs prior to or during the use of vehicles or even have any alcohol around Cobra BEC vehicles." Thus, Baroni's objection as to the last sentence is denied or overruled.

C. Motion for Summary Judgment.

Baroni seeks summary judgment on the issue of Turner's and Cobra BEC's liability for the wrongful death of her husband and two daughters.

1. Turner's Liability.

Baroni alleges that, pursuant to Idaho Code § 5-311, Turner is liable for the wrongful deaths of her husband, Mathew-Micheal Theron Baroni, and her two

daughters, Madilyn Jeanne Baroni and Molli Catherine Baroni. Pl.'s Mem. Supp. Pl.'s Mot. Summ. J. 5–10. In response, Turner admits liability and does not oppose entry of judgment against him on the issue of his liability under Idaho Code § 5-311. Def. Ryan J. Turner's Resp. Pl.'s Mot. Summ. J. 3–4. The Court reviews the argument and evidence presented by Baroni to determine whether she established that there is no genuine issue of material fact as to each element of her claim (except damages) and, based upon evidence and legal authority, she is entitled to judgment as a matter of law. *See Idaho Prop. Mgmt. Servs., Inc. v. MacDonald*, 157 Idaho 959, ___, 343 P.3d 671, 674 (Ct. App. 2014).

Idaho Code § 5-311 provides:

> (1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.
>
> (2) For the purposes of subsection (1) of this section, and subsection (2) of section 5-327, Idaho Code, "heirs" means:
>
> (a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (22) of section 15-1-201, Idaho Code.
>
> (b) Whether or not qualified under subsection (2)(a) of this section, the decedent's spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

I.C. § 5-311. Subsection (22) of Idaho Code § 15-1-201 states:

> Subject to additional definitions contained in the subsequent chapters which are applicable to specific chapters or parts, and unless the context otherwise requires, in this code:

> . . .
> (22) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

I.C. § 15-1-201(22). The relevant intestate succession statutes are Idaho Code § 15-2-102 and § 15-2-103. Idaho Code § 15-2-102 provides:

> The intestate share of the surviving spouse is as follows:
> (a) As to separate property:
> (1) If there is no surviving issue or parent of the decedent, the entire intestate estate;
> (2) If there is no surviving issue but the decedent is survived by a parent or parents, one-half (1/2) of the intestate estate;
> (3) If there are surviving issue of the deceased spouse, one-half (1/2) of the intestate estate.
> (b) As to community property:
> (1) The one-half (1/2) of community property which belongs to the decedent passes to the surviving spouse.

I.C. § 15-2-102. Idaho Code § 15-2-103 states:

> The part of the intestate estate not passing to the surviving spouse under section 15-2-102 of this part, or the entire intestate estate if there is no surviving spouse, passes as follows:
> (a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
> (b) If there is no surviving issue, to his parent or parents equally;
> . . . .

I.C. § 15-2-103.

It is undisputed that Baroni is the surviving spouse and personal representative of the Estate of Mathew-Michael Theron Baroni. Baroni Dec. 1–2, ¶¶ 2–3. Similarly, it is undisputed that Baroni is the mother and sole heir of her daughters Madilyn Jeanne Baroni and Molli Catherine Baroni. Baroni Dec. 1–2, ¶¶ 2, 4. Thus, pursuant to Idaho Code § 5-311, Baroni may bring this wrongful death suit.

In a wrongful death suit, Baroni must prove two elements: (1) that an actionable wrong was committed by the defendant against the decedent, and (2) that the same

actionable wrong caused the decedent's death. *Castorena v. Gen. Elec.*, 149 Idaho 609, 619, 238 P.3d 209, 219 (2010). In her Memorandum in Support of Motion for Summary Judgment, Baroni argues that "there is no genuine dispute as to the facts demonstrating that an actual wrong (negligence) was committed by Ryan J. Turner against Mathew-Micheal Theron Baroni, Madilyn Jeanne Baroni, and Molli Catherine Baroni, nor is there any genuine dispute as to the fact that the same wrongful act caused the deaths of Mathew-Micheal Theron Baroni, Madilyn Jeanne Baroni, and Molli Catherine Baroni." Pl.'s Mem. Supp. Pl.'s Mot. Summ. J. 7. Baroni states that Turner's liability is undisputed because Turner, in his Answer, admitted all elements of Baroni's claim of wrongful death. Pl.'s Mem. Supp. Pl.'s Mot. Summ. J. 8–10. Baroni cites to her Complaint and Turner's Answer to support her argument that the material facts are undisputed. *Id.* However, the Court notes that both Baroni's Complaint and Turner's Answer are unverified and, therefore, consist of unsworn statements. "Unsworn statements are entitled to no probative weight in passing on motions for summary judgment." *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984); *Golay v. Loomis*, 118 Idaho 387, 389, 797 P.2d 95, 97 (1990). *But see Stapleton v. Jack Cushman Drilling & Pump Co. Inc.*, 153 Idaho 735, 741, 291 P.3d 418, 424 (2012) ("[U]nsworn statements can be considered if there is no objection." (citing *Heinze v. Bauer*, 145 Idaho 232, 236, 178 P.3d 597, 601 (2008))).

While the Court need only consider cited materials, it may consider other materials in the record. I.R.C.P. 56(c)(3). Therefore, the Court turns to other materials in the record to determine if there is no genuine dispute of material fact as to Turner's liability. The Second Declaration of Ron T. Blewett, submitted by Cobra BEC, includes a copy of the Judgment entered in *State of Idaho v. Ryan J. Turner*, Kootenai County

Case No. CR-2015-15617. A Judgment in a criminal proceeding is admissible in a civil proceeding pursuant to Idaho Rule of Evidence 801(d)(2), admission by a party-opponent statement. *Mattson v. Bryan*, 92 Idaho 587, 591, 448 P.2d 201, 205 (1968); *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995). The Judgment indicates that Turner pled guilty to three counts of violating Idaho Code § 18-4006(3)(a),[2] vehicular manslaughter, a felony. Judgment 2. Gross negligence is an element of the crime of vehicular manslaughter under § 18-4006(3)(a). Thus, in pleading guilty to violating Idaho Code § 18-4006(3)(a), Turner admitted to the commission of an unlawful act with gross negligence. That admission, in turn, is evidence that an actionable wrong (negligence) was committed by Turner against Mathew-Micheal Theron Baroni, Madilyn Jeanne Baroni, and Molli Catherine Baroni, and it is evidence that the same actionable wrong (negligence) caused the deaths of Mathew-Micheal Theron Baroni, Madilyn Jeanne Baroni, and Molli Catherine Baroni. Furthermore, Turner does not dispute this evidence or otherwise challenge Baroni's argument that he is liable for the wrongful deaths of Baroni's husband and two daughters. Therefore, because there is no genuine dispute of material fact related to Turner's liability, Baroni is entitled to summary judgment on that issue.

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[2] Idaho Code § 18-4006(3)(a) provides:

> Manslaughter is the unlawful killing of a human being . . . without malice. It is of three (3) kinds:
>
> . . .
>
> 3. Vehicular—in which the operation of a motor vehicle is a significant cause contributing to the death because of:
>
> (a) the commission of an unlawful act, not amounting to a felony, with gross negligence
>
> . . . .

I.C. § 18-4006(3)(a).

2. Cobra BEC's Liability.

Baroni contends that the undisputed facts show that Turner had permission to drive the Silverado and, therefore, Turner's liability is imputed to Cobra BEC pursuant to Idaho Code § 49-2417. In support of her argument, she cites to Turner's deposition testimony, the deposition testimony of Aaron Nuss (Nuss), and Cobra BEC's Personal Use of Company Vehicle Policy. Pl.'s Mem. Supp. Mot. Summ. J. 12–13. In response, Cobra BEC argues that whether Turner had permission to drive the Silverado is a question of fact for a jury, which precludes summary judgment. Def. Cobra BEC, Inc.'s Br. Opp'n Pl.'s Mot. Summ. J. 2. In addition, Cobra BEC generally argues that Turner's use was not permissive because driving while intoxicated violated Cobra BEC's employee policies, standards, and rules. *Id.* at 2–4, 19–25.

Under Idaho Code § 49-2417(1), "the owner of a motor vehicle is liable when any person using or operating the vehicle 'with the permission, expressed or implied, of the owner' operates that vehicle negligently." *Or. Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho*, 148 Idaho 47, 52, 218 P.3d 391, 396 (2009) (quoting I.C. § 49-2417(1)). The Idaho Supreme Court in *Oregon Mutual* adopted the "'liberal' or 'initial permission' rule" when interpreting Idaho Code § 49-2417. *Id.* at 54, 218 P.3d at 398. The Idaho Supreme Court in *Oregon Mutual* specifically stated, "…we find the initial permission rule to be consistent with I.C. §§ 49-1212 and 2417, as well as Idaho public policy." The Idaho Supreme Court then discussed that "public policy." *Id.* The Idaho Supreme Court held that "Neither of these provisions [I.C. §§ 49-1212 and 49-2417] create limitations based upon the scope of permission. This is consistent with the public policy goal of ensuring that the users of Idaho roadways are insured." *Id.* In announcing the "initial permission rule", the Idaho Supreme Court discussed the two other competing

rules adopted by some courts in other states and explained why it was not adopting either of those rules. The Idaho Supreme Court in *Oregon Mutual* held:

> In *Farm Bureau Mutual Insurance Co. of Idaho v. Hmelevsky,* 97 Idaho 46, 539 P.2d 598 (1975), the Court considered differing rules concerning the scope of general and specific permission to use a vehicle, as adopted in *Ryan v. Western Pacific Insurance Co.,* 242 Or. 84, 408 P.2d 84 (1965):
>
> > These have been catalogued as falling into one of three rules: (1) The 'strict' or 'conversion' rule, i.e., any deviation from the scope of the permission given ends coverage; (2) The 'minor deviation' rule, i.e., a minor deviation from the scope of the initial permission does not end coverage, but a major deviation does; and (3) The 'liberal' or 'initial permission' rule, i.e., the permittee is covered although the use is beyond the scope of the initial permission unless the use so far exceeds the initial permission that the permittee is akin to a thief or converter.
>
> *Farm Bureau,* 97 Idaho at 49, 539 P.2d at 601 (quoting *Ryan,* 408 P.2d at 86). Though the Court in *Ryan* declined to adopt any of the three rules and instead adopted the intra-family relationship permission rule, we find the initial permission rule to be consistent with I.C. §§ 49–1212 and 2417, as well as Idaho public policy.
>
> As described above, I.C. § 49–2417 defines liability for a motor vehicle owner to include the negligent operation of the vehicle by any person "with the permission, expressed or implied, of the owner." In addition, I.C. § 49–1212(1)(b) describes requirements for liability insurance policies to include insuring any person using the vehicle "with the express or implied permission of the named insured." Neither of these provisions create limitations based upon the scope of permission. This is consistent with the public policy goal of ensuring that the users of Idaho roadways are insured. Here, Tananda granted Thompson permission to drive the vehicle to purchase gasoline, and he only slightly exceeded the scope of that permission by driving in the direction of Middleton on Highway 44. Additionally, neither Tananda nor her parents took any actions to limit the scope of Thompson's permission to drive when it would have been apparent that Thompson had not simply driven to the gas station and back. They could have reported the vehicle as stolen following the accident, but did not, from which the trial court could infer there was implied permission to drive to where the accident took place. In addition, Tananda then provided proof of insurance for Thompson. Furthermore, Thompson did not so exceed the initial scope of permission as to be "akin to a thief or converter." Thus, under the initial permission rule, there is substantial and competent evidence that Thompson was acting within the scope of express permission at the time of the accident. Therefore, we affirm the district court's finding that Thompson had permission to drive the vehicle at the time of the accident.

Id. The "initial permission" rule provides that use of a vehicle remains permissive even if the use is beyond the scope of initial permission "unless the use so far exceeds the initial permission that the permittee is akin to a thief or converter." *Id.* (*citing Farm Bureau Mut. Ins. Co. v. Hmelevsky,* 97 Idaho 46, 539 P.2d 598 (1975) discussing the "three differing rules" including the "'liberal' or 'initial permission' rule", and citing *Ryan v. Western Pacific Ins. Co.,* 242 Or. 84, __, 408 P.2d 84, 86 (1965)). The Supreme Court of Oregon *en banc* in *Ryan* discussed the three prevailing rules, noting that in an earlier case, *Denley v. Oregon Auto Ins. Co.*, 151 Or. 42, 55, 47 P.2d 245, 47 P.2d 946 (1935), other states' appellate courts had referred to *Denley* with apparent approval in decisions embracing the "initial permission" rule, including the leading case of *Dickinson v. Maryland Casualty Company*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924). *Ryan,* 242 Or. At 88, 408 P.2d at 86. The Supreme Court of Oregon also noted that New Jersey in *Small v. Schuncke*, 42 N.J. 407, 201 A.2d 56 (1964), also had adopted the "initial permission" rule. *Id.* at 89, 408 P.2d at 87. The "initial permission rule" is also found in *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 585 (Minn. 2003). The element of express or implied permission is a question of fact for a jury, "unless the evidence is such that only one reasonable conclusion is deducible therefrom." *Allied Grp. Ins. Co. v. Allstate Ins. Co.*, 123 Idaho 733, 736, 852 P.2d 485, 488 (1993) (quoting 8 Am. Jur. 2d § 605) (discussing implied permission).

Based on these principles, the Court first determines whether there are undisputed facts demonstrating that Cobra BEC was the owner of the Silverado and Turner had express or implied permission to operate the Silverado. It is undisputed that Cobra BEC owns the Silverado involved in the September 12, 2015, collision. Nuss Dec. 4, ¶¶ 10, 12. The Court also finds that the undisputed facts demonstrate that

Turner had express permission to operate Cobra BEC's Silverado for non-business purposes on September 12, 2015. The evidence cited by Baroni supports that conclusion. First, Turner testified that Cobra BEC gave him permission to use the Silverado for non-business purposes. Turner stated:

> Q. Okay. Let's talk about the use of this pickup and the prior pickup. Cobra gave you permission to use one of its pickup trucks to go to and from work, didn't it?
> A. Yes.
> Q. Okay. And you did in fact, as we've discussed, use the pickup provided to go to work to and from your residence, to and from the job site back to your residence?
> A. Yes.
> Q. Okay. And you were given permission to use this pickup truck and the prior one for your personal use, as well; correct?
> A. On occasion.

Zeimantz Dec. Ex. G, Turner Dep. 58:10–22. Second, Nuss, Chief Financial Officer for Cobra BEC, testified that Turner had "limited" permission to use the Silverado for non-business purposes. He stated:

> Q. When the pickup truck involved in the collision with the Baroni vehicle was issued to Mr. Turner in February of 2015, the company allowed him to use that in his work for the company; correct?
> A. Correct.
> Q. And the company also allowed him to take that vehicle home at night and garage it or park it at his residence?
> A. In conjunction with our Vehicle Safety Program, yeah, he had limited permission to use it outside of work.
> Q. And he was allowed to park it at his house.
> A. Yes.
> Q. Okay. And he was also allowed, as you're intimating, he had some permission to make non-business use of the vehicle, as well; correct?
> A. Correct.
> Q. All right. At the time of the collision between the Cobra vehicle driven by Mr. Turner with the Baroni vehicle, was Mr. Turner on company business?
> A. No.
> Q. So that was a non-business use of the pickup truck at that time?
> A. Yes.

Zeimantz Dec. Ex. H, Nuss Dep. 25:6–26:4. Third, Cobra BEC's Personal Use of Company Vehicle Policy expressly permits employees to use Cobra BEC vehicles for

non-business purposes. It provides: "Company vehicles issued to employees may be taken home at night or used for non-business activities under the guidelines of Cobra's Fleet Safety Program." Zeimantz Dec. Ex. A; Nuss Dec. Ex. C, at 10000698.

Cobra BEC does not seem to dispute these facts. Rather, in response, Cobra BEC argues that Baroni has provided this Court with an incomplete set of facts relating to Turner's permission to use the Silverado and, based on that incomplete set of facts, Baroni erroneously concludes (and urges this Court to conclude) that Turner had Cobra BEC's permission to operate the Silverado on September 12, 2015. Def. Cobra's Statement Disputed Material Fact 2, 4–6. Cobra BEC points out that the Personal Use of Company Vehicle Policy prohibits alcohol consumption. *Id.* at 4 (citing Zeimantz Dec. Ex. H; Nuss Dep. 26:10–13). Cobra BEC states that it has a robust and "nationally renowned" safety program that imposes various safety requirements on all employees who operate Cobra BEC vehicles; Turner was not permitted to operate the Silverado after consuming alcohol pursuant to that safety program; Turner testified that he knew Cobra BEC prohibited employees from operating Cobra BEC vehicles after consuming alcohol; and on September 12, 2015, Turner operated the Silverado after consuming alcohol in violation of Cobra BEC's safety program and policies.[3] *Id.* at 4–6 (citations omitted). Based on these facts, Cobra BEC argues that it did not permit Turner to operate the Silverado on September 12, 2015. *Id.* at 5 (citing Dix Dec.; Nuss Dec.; Second Nuss Dec.; Waite Dec.)

The Court finds that the facts presented by Cobra BEC are immaterial, at least at this summary judgment juncture, because the facts and argument Cobra BEC has presented relate to the scope of permission granted and whether Turner so far

[3] Cobra BEC cites to various portions of the Declaration of Travis Dix, Declaration of Aaron Nuss, Declaration of Dan Waite, and Defendant Cobra BEC, Inc.'s Deposition Excerpts

exceeded the scope of permission that he is akin to a thief or converter. That issue is discussed below. As a result, Cobra BEC has failed to rebut Baroni's evidence and show that there is a genuine issue of material fact relating to Turner's permission to use the Silverado for non-business purposes on September 12, 2015. Here, the facts at issue are whether Cobra BEC owned the Silverado and whether Cobra BEC gave Turner permission to operate the Silverado. As noted above, based on evidence submitted by Baroni, it is undisputed that Cobra BEC owned the Silverado and that Cobra BEC expressly permitted Turner to use the Silverado for non-business purposes.

The Court turns to the application of the initial permission rule and whether there are undisputed facts showing that Turner's use of the Silverado did not so far exceed the initial (express) permission granted that he is akin to a thief or converter. Under the initial permission rule, Turner's use of the Silverado is permissive and liability is imputed to Cobra BEC even if Turner's use of the Silverado was beyond the initial scope of permission unless Turner so far exceeded the initial permission that he is akin to a thief or converter. *See Or. Mut. Ins. Co.*, 148 Idaho at 52, 218 P.3d at 396. Cobra BEC has alleged that Turner is akin to a converter. Consequently, in her Motion for Summary Judgment, Baroni argues that the undisputed facts, when viewed in light of Idaho law and persuasive authority, demonstrate that Turner is not a converter.

Idaho appellate courts have not addressed what type of use is so excessive such that the use constitutes a conversion under the initial permission rule. In other contexts, the Idaho Supreme Court has defined a conversion as an intentional act of "dominion wrongfully exerted over another's personal property in denial or inconsistent with his rights therein, such as a tortious taking of another's chattel, or any wrongful exercise . . . over another's goods, depriving him of the possession, permanently or for

an indefinite time." *Gissel v. State*, 111 Idaho 725, 727, 727 P.2d 1153, 1155 (1986) (quoting *Klam v. Koppel,* 63 Idaho 171, 118 P.2d 729 (1941)). Because conversion requires an intentional act, the Restatement (Second) of Torts explains that "[m]ere non-feasance or negligence . . . is not sufficient for conversion." Restatement (Second) of Torts § 223, cmt. b. Thus,

> an act which is not intended to exercise any dominion or control over a chattel but is merely negligent with respect to it is not a conversion, even though it may result in the loss or destruction of the chattel. . . . [I]t is not a conversion negligently to drive into the plaintiff's automobile and wreck it.

Restatement (Second) of Torts § 224, cmt. b. Here, the undisputed facts demonstrate that Cobra BEC placed the Silverado in Turner's possession and Cobra BEC expressly authorized Turner to use the Silverado for business and non-business purposes. The (undisputed) fact that Turner operated the Silverado after consuming alcohol, in violation of Idaho law and Cobra BEC's safety program and policies, does not demonstrate Turner's intent to appropriate or otherwise destroy the Silverado. Rather, it is evidence of Turner's negligence—his breach of a duty of ordinary care as a driver in Idaho.

In *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580 (Minn. 2003), the Minnesota Supreme Court considered whether Harvey Christensen (Christensen), a driver's education instructor, converted a school-owned van under Minnesota statute[4] and the initial permission rule. The school permitted Christensen to park the school-owned van at his house, but Christensen did not have permission to use the van for personal reasons at any time. *Id.* at 582–83. This is significantly more narrow than the permission accorded Turner by Cobra BEC. On July 1, 1994, Christensen took the van

[4] Similar to Idaho Code § 49-2417, "Minnesota law provides that an owner of a motor vehicle may be held vicariously liable for driver's use of that vehicle if the owner gives the driver express or implied permission." *Christensen*, 658 N.W.2d at 584 (citing Minn. Stat. § 170.54

for a drive, he was involved in a collision with another vehicle, and the van was destroyed. *Id.* at 583. Christensen was intoxicated at the time of the collision. *Id.* A passenger in the other vehicle sued Christensen, the school, and others for damages. *Id.* The Minnesota Supreme Court held that "under the 'theft or conversion' exception to the initial permission rule, the intentional dominion or control necessary for 'conversion' cannot be shown by accidental destruction of the vehicle in a collision, and therefore, because there is no other basis for finding the requisite wrongful intent, Christensen did not covert the van." *Id.* at 586. In reaching the decision, the Minnesota Supreme Court relied on the Restatement (Second) of Torts and public policy. It stated:

> The Restatement defines conversion as "an intentional exercise of dominion or control over the chattel." Restatement (Second) of Torts § 223 cmt. b (1965). As such, "[m]ere nonfeasance or negligence, without such an intent, is not sufficient for conversion." *Id.* Describing the character of the intent required, the Restatement explains:
>
> > The intention necessary to subject to liability one who deprives another of the possession of his chattel is merely the intention to deal with the chattel so that such dispossession results. It is not necessary that the actor intend to commit what he knows to be a trespass or a conversion. It is, however, necessary that his act be one which he knows to be destructive of any outstanding possessory right, if such there be.
>
> Restatement (Second) of Torts § 222 cmt. c (1965).
>
> We find the Restatement instructive. A wrongful intent to appropriate chattel for one's own purposes is the essence of the "conversion or theft" exception. To hold that conversion requires an intentional destruction of the vehicle unnecessarily narrows the meaning of "conversion." In the instant case, it is undisputed that Christensen did not intend to wrongfully deprive the school district of its right to use or control its van. *Christensen,* 643 N.W.2d at 644 ("There is no evidence that Christensen's destruction of the vehicle was intentional. To the contrary, all parties seem to agree it was accidental.").

(2002)).

Id. at 585–86. The Minnesota Supreme Court also explained that a contrary holding would be inconsistent with public policy: "[d]etermining that a decision resulting in negligent behavior constitutes conversion contravenes the express public policy of our state to provide certainty of recovery for those injured in automobile accidents." *Id.* at 586–87. Thus, for this Court to hold that Turner's decision to drink and drive on September 11 and 12, 2015, constitutes a theft or conversion of Cobra BEC's vehicle, the Court would have to ignore the intent element of "conversion or theft" and the Court would have to ignore the policy reasons behind I.C. § 49-2417.

The facts in this case are analogous to *Christensen*. Like the school district in *Christensen*, Cobra BEC permitted Turner to use the Silverado for business purposes and to park the Silverado at his residence. While Christensen was prohibited from using the van for personal reasons, Cobra BEC allowed Turner to use the Silverado for personal use. That fact alone distinguishes *Christensen* from the present case, and makes the holding in *Christensen* even more likely to be the appropriate holding in the present case where Turner had Cobra BEC's permission to use the vehicle for personal use. Both the school district in *Christensen* and Cobra BEC in the present case prohibited their employees from driving employer vehicles while intoxicated. Both Christensen and Turner disregarded that prohibition and drove their employers' respective vehicles while intoxicated, resulting in collisions that destroyed the school district's van and Cobra BEC's Silverado. In *Christensen*, the Minnesota Supreme Court explained that it is undisputed that Christensen did not intend to wrongfully deprive the school district of its right to use or control its van. Likewise, in this case, it is undisputed that Turner did not intend to wrongfully deprive Cobra BEC of its right to use or control its Silverado. Turner's decision to drive while intoxicated, and the loss of life

and destruction of property that resulted therefrom, is not evidence that he intended to deprive Cobra BEC of its Silverado. Rather, it is evidence of negligence with respect to others and the Silverado.

In summary, the undisputed facts demonstrate that Cobra BEC permitted Turner to use the Silverado for non-business purposes on September 12, 2015. In addition, the undisputed fact that Turner drove the Silverado while intoxicated is not evidence of a conversion. The intent element is lacking. Therefore, the Court grants Baroni's Motion for Summary Judgment as to Cobra BEC's liability.

This holding is no doubt frustrating for Cobra BEC which has gone to great lengths to explain its superior safety rules regarding alcohol consumption and use of its vehicles by its employees, the excellent training it gives its employees on those rules as a matter of course, and the awards it has received. Cobra BEC should be proud of those rules and those accomplishments. However, those safety rules do not create under I.C. § 49-2417, a special class for employees who have initial permission, but then lose that permission because the employee then violates the rules the employer has rules that prohibit consuming alcohol and driving their vehicles. As set forth above, the only two inquiries under I.C. § 49-2417 and the initial permission rule are, a) did Cobra BEC own the Silverado Turner used on September 11-12, 2015, and b) did Cobra BEC give Turner permission to use the Silverado for personal use? As shown above, those two questions must be answered "yes" in the instant case. There is no third inquiry (or subpart to the second inquiry) as to whether Cobra BEC had sufficient policies in place prohibiting the use of alcohol while driving a Cobra BEC vehicle so as to trump, truncate or terminate its permission it had earlier already given. If this Court were to do so, essentially it would be making an end run around the Idaho Supreme Court's decision in *Oregon Mutual* to adopt the "initial permission rule", and instead it

would be allowing Cobra BEC (and really its insurer), since Cobra BEC has these safety policies and standards, to reap the protections of the "minor deviation" rule, if not the "strict, any deviation rule", and, concomitantly, deny Baroni coverage for compensation for the wrongful deaths of her husband and her two children which Turner caused. To do so would go directly against not only the initial permission rule articulated by the Idaho Supreme Court in *Oregon Mutual,* but this Court would also trample and eviscerate the policy reasons give the Idaho Supreme Court when it adopted the "initial permission rule." Again, the Idaho Supreme Court in Oregon Mutual wrote:

> **…we find the initial permission rule to be consistent with I.C. §§ 49–1212 and 2417, as well as Idaho public policy.**
>
> As described above, I.C. § 49–2417 defines liability for a motor vehicle owner to include the negligent operation of the vehicle by any person "with the permission, expressed or implied, of the owner." In addition, I.C. § 49–1212(1)(b) describes requirements for liability insurance policies to include insuring any person using the vehicle "with the express or implied permission of the named insured." Neither of these provisions create limitations based upon the scope of permission. **This is consistent with the public policy goal of ensuring that the users of Idaho roadways are insured.**

148 Idaho at 54, 218 P.3d at 398. (bold added). This Court is not willing to ignore the Idaho Supreme Court's "initial permission rule" or its stated policy reasons.

The Supreme Court of Minnesota in *Christensen* explained the "initial permission rule" in light of the applicable public policy, holding:

> In *Milbank Mutual Insurance Co. v. United States Fidelity and Guaranty Co.,* we adopted the initial permission rule. 332 N.W.2d 160, 165 (Minn.1983) (noting that the policy behind Minn.Stat. § 170.54 [the Safety Responsibility Act] is to ensure "persons injured by the negligent operation of automobiles 'an approximate certainty' of an effective recovery" when liability would not otherwise exist) (citation omitted). Under the initial permission rule, when permission to use a vehicle is initially given, subsequent use, short of actual conversion or theft, remains permissive even though the use is not within the contemplation of the parties or is outside the scope of the initial grant of permission. *Id.* at 167; *see also* 6C John Alan Appelman & Jean Appelman, *Insurance Law and Practice* § 4366, at 197, § 4367 (Richard B. Buckley ed. 1979) ("[Some]

> states have arbitrarily adopted a doctrine [known as the hell or high water rule, or the initial permission rule] that if the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated."). In *Milbank,* we looked to legislative history and to our trend of interpreting the Safety Responsibility Act and omnibus clauses in liability insurance policies to conclude "that the public policy of this state favors protection of the uncompensated victims of automobile accidents over any interest of an owner-insured or his insurer that he be not subject to liability when his permittee exceeds the scope of the initial permission." 332 N.W.2d at 166-67.

658 N.W.2d at 585. Cobra BEC might well ask, "With the policies we have in place, what do we have to do to get around the "hell or high water" component found in the "initial permission rule." The Idaho Supreme Court has provided some insight as to this answer. In *Oregon Mutual*, the Idaho Supreme Court stated:

> As described above, I.C. § 49–2417 defines liability for a motor vehicle owner to include the negligent operation of the vehicle by any person "with the permission, expressed or implied, of the owner." In addition, I.C. § 49–1212(1)(b) describes requirements for liability insurance policies to include insuring any person using the vehicle "with the express or implied permission of the named insured." Neither of these provisions create limitations based upon the scope of permission. This is consistent with the public policy goal of ensuring that the users of Idaho roadways are insured. Here, Tananda granted Thompson permission to drive the vehicle to purchase gasoline, and he only slightly exceeded the scope of that permission by driving in the direction of Middleton on Highway 44. Additionally, neither Tananda nor her parents took any actions to limit the scope of Thompson's permission to drive when it would have been apparent that Thompson had not simply driven to the gas station and back. They could have reported the vehicle as stolen following the accident, but did not, from which the trial court could infer there was implied permission to drive to where the accident took place. In addition, Tananda then provided proof of insurance for Thompson. Furthermore, Thompson did not so exceed the initial scope of permission as to be "akin to a thief or converter." Thus, under the initial permission rule, there is substantial and competent evidence that Thompson was acting within the scope of express permission at the time of the accident. Therefore, we affirm the district court's finding that Thompson had permission to drive the vehicle at the time of the accident.

148 Idaho at 54, 218 P.3d at 398. It is clear that once permission is given, as it was by Cobra BEC to Turner in this case, policy language and procedures and safety awards are not sufficient to revoke that permission. However, permission can be revoked. Had Larry Wagenius, Jr., after talking to Turner at the September 11, 2015, event where he witnessed Turner consume alcohol, called Dan Waite, Turner's supervisor, or certainly Travis Dix, president of Cobra BEC, on his cell phone and reported his observations, and had either Waite or Dix then told Turner over the phone that "Cobra BEC revokes your permission to drive your company vehicle effective immediately", then, if Turner chose to drive the Silverado it would be *without* permission, and akin to a theft or a conversion. If Waite or Dix added, "And if you drive that vehicle you have committed theft of that vehicle", it wouldn't be "akin" to a theft or conversion, it would *be* a theft or conversion. But those conversations did not happen in the present case. This Court's finding that once permission was given, policy language, procedures and safety awards do not revoke that permission is consistent with the policy of the statute, I.C. § 49-2417. As articulated by the Idaho Supreme Court in *Oregon Mutual*, "the public policy goal of ensuring that the users of Idaho roadways are insured." Three people were killed by Turner, who made the intentional decision to drink and to drive his company vehicle while intoxicated, driving on the wrong side of the road. In doing so, Turner did not intentionally steal his company vehicle on September 11 and 12, 2015, nor did he have the intent to convert it.

Again, had Turner driven after Waite or Dix told Turner that Cobra BEC revoked its permission and that he was committing theft if he drove that vehicle, and then the accident occurred, there would be a different outcome. In that scenario, three people would have been killed by Turner, a man who made the intentional decision to drink and to drive his company vehicle while intoxicated, who chose to drive on the wrong

side of the road, *and who made the intentional decision to steal his employer's car*. In this hypothetical, it is only the last intentional act of Turner in stealing his employer's vehicle, which would have revoked the Cobra BEC's permission to use that car for personal purposes, and cause Cobra BEC to not be liable.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court grants Baroni's Motion for Summary Judgment on the issue of Turner's and Cobra BEC's liability.

As for Cobra BEC's objections to Baroni's evidence, and Baroni's objections to Cobra BEC's evidence, the Court has announced its rulings above.

IT IS HEREBY ORDERED plaintiff Meghan Baroni's Motion for Summary Judgment on the issue of defendant Ryan J. Turner's liability is GRANTED.

IT IS FURTHER ORDERED plaintiff Meghan Baroni's Motion for Summary Judgment on the issue of defendant Cobra BEC's liability is GRANTED.

IT IS FURTHER ORDERED the Court makes its rulings on the evidentiary issues posed by plaintiff Baroni and defendant Cobra BEC consistent with this Court's memorandum decision above.

Entered this 9th day of August, 2017.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2017, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John R. Zeimantz		Peter C. Erbland	664-6338
Jonathan D. Hally	208-413-6682		

_____
Jeanne Clausen, Deputy Clerk